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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 SALLY JO JOHNSON, )  
09 Plaintiff, ) CASE NO. C10-1469-TSZ  
10 v. )  
11 MICHAEL J. ASTRUE, Commissioner ) REPORT AND RECOMMENDATION  
of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
12 Defendant. ) APPEAL  
13 \_\_\_\_\_ )

14 Plaintiff Sally Jo Johnson proceeds through counsel in her appeal of a final decision of  
15 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
16 denied plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing  
17 before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the  
18 administrative record (AR), and all memoranda of record, the Court recommends that this  
19 matter be REVERSED and REMANDED for further proceedings.

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01 **FACTS AND PROCEDURAL HISTORY**

02 Plaintiff was born on XXXX, 1963.<sup>1</sup> She attended school through the seventh grade,  
03 obtained a vocational degree in travel tourism, and has a GED. (AR 24, 44.) Her past relevant  
04 work was as a cleaner/housekeeper. (AR 30, 46.)

05 Plaintiff filed an application for SSI on April 25, 2007, alleging disability beginning  
06 June 1, 1981.<sup>2</sup> Plaintiff's application was denied at the initial level and on reconsideration, and  
07 she timely requested a hearing.

08 On January 25, 2010, ALJ Ruperta M. Alexis held a hearing, taking testimony from  
09 plaintiff and a vocational expert. (AR 40-82.) On February 10, 2010, the ALJ issued a  
10 decision, finding plaintiff not disabled. (AR 20-31.)

11 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
12 on August 23, 2010, (AR 1-5), making the ALJ's decision the final decision of the  
13 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining  
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
19 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had

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21 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of  
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case  
Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

22 <sup>2</sup> A previous claim was denied and is administratively final. (AR 20.)

01 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
02 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
03 bipolar disorder, attention deficit disorder, and low back pain severe. Step three asks whether  
04 a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's  
05 impairments did not meet or equal the criteria of a listed impairment.

06 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
07 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
08 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift  
09 and/or carry twenty pounds occasionally and ten pounds frequently, able to stand and/or walk  
10 six hours in an eight hour workday with normal breaks, and able to sit six hours in an eight hour  
11 workday with normal breaks, climb ramps and stairs occasionally, stoop and crouch  
12 occasionally, balance, kneel and crawl frequently, one third to two thirds of an eight hour  
13 workday, and finger less than constantly with the left non-dominant hand. No visual or  
14 communicative limitations were imposed. Plaintiff should avoid concentrated exposure to  
15 extreme cold and vibration. She was able to understand, remember, and repeat simple tasks  
16 throughout the course of a normal workday, which involve no more than occasional interaction  
17 with co-workers and the general public. She could understand, remember and accept  
18 instructions from supervisors. With that assessment, the ALJ found plaintiff unable to perform  
19 her past relevant work as a cleaner/housekeeper as performed at the medium exertional level.

20 If a claimant demonstrates an inability to perform past relevant work, the burden shifts  
21 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
22 an adjustment to work that exists in significant levels in the national economy. With the

01 assistance of a vocational expert, the ALJ found plaintiff capable of performing her past  
02 relevant work as a cleaner/housekeeper as performed in the national economy.

03       This Court's review of the ALJ's decision is limited to whether the decision is in  
04 accordance with the law and the findings supported by substantial evidence in the record as a  
05 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
06 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
07 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
08 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
09 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
10 F.3d 947, 954 (9th Cir. 2002).

11       Plaintiff argues that the ALJ erred in the evaluation of her mental impairments at steps  
12 two and three and failed to properly consider the opinion of consulting physician Dr. Heilbrunn  
13 as to her physical limitations. As a result, plaintiff argues, the ALJ's credibility assessment  
14 and RFC assessment are erroneous. Plaintiff also submits that the ALJ erred in finding that she  
15 is capable of returning to her past relevant work as generally performed in the national  
16 economy. She requests remand for an award of benefits or, alternatively, for further  
17 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by  
18 substantial evidence and free of legal error, and should be affirmed.

#### 19                               Step Two Severe Impairments

20       At step two of the sequential evaluation process, a claimant must make a threshold  
21 showing that her medically determinable impairments significantly limit her ability to perform  
22 basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§

01 404.1520(c), 416.920(c). “Basic work activities” refers to “the abilities and aptitudes  
02 necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b).

03 A diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant  
04 must show that her medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c),  
05 416.920(c). “An impairment or combination of impairments can be found ‘not severe’ only if  
06 the evidence establishes a slight abnormality that has ‘no more than a minimal effect on an  
07 individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting  
08 Social Security Ruling (SSR) 85-28). “[T]he step two inquiry is a de minimis screening device  
09 to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also  
10 required to consider the “combined effect” of an individual’s impairments in considering  
11 severity. *Id.*

12 Plaintiff argues that the ALJ erred by failing to consider her diagnosed anxiety disorder  
13 at step two, overlooking certain relevant medical records and opinions from Dr. Anselm  
14 Parlatore, Dr. Douglas Uhl, and Kristine Harrison, Psy.D. Further, plaintiff argues that the  
15 ALJ made conflicting findings as to whether her Attention-Deficit/Hyperactivity Disorder  
16 (ADD/ADHD) is a step two severe impairment.

17 In response, the Commissioner notes that the ALJ acknowledged and discussed  
18 plaintiff’s PTSD and anxiety disorder. The Commissioner argues that the discussion of the  
19 evidence in the ALJ’s decision shows that the above-referenced medical opinions were  
20 considered. The Commissioner disputes the contention that the ALJ made contradictory  
21 findings about the severity of plaintiff’s ADD/ADHD, arguing that it was logically consistent  
22 for the ALJ to find her bipolar disorder and ADD severe at step two (AR 22), but to later

01 conclude that the ADD/ADHD did not rise “to the level of constituting a severe mental  
02 impairment”, noting that the impairment was no more than mild when plaintiff was medicated,  
03 and did not account for any limitations beyond those stemming from her bipolar disorder. (AR  
04 26.) Further, the Commissioner argues, any error was rendered harmless by the assessment of  
05 appropriate conditions by the ALJ at step four.

06       The Court finds it necessary to remand this case to allow the ALJ to clarify the step two  
07 findings regarding plaintiff’s mental impairments. Notwithstanding the Commissioner’s  
08 defense of the logic and legal sufficiency of the ALJ’s step two findings, the record suggests  
09 that a scrivener’s error may have led to the identification of plaintiff’s ADD as a severe  
10 impairment in one portion of the decision (AR 22), with a seemingly contrary finding later in  
11 the decision (AR 26). Otherwise, the omission of plaintiff’s anxiety disorder as an identified  
12 severe impairment at step two would be puzzling, given the ALJ’s discussion of plaintiff’s  
13 mental impairments, including her anxiety disorder, followed with the ALJ’s finding that “the  
14 above listed impairments are both medically determinable and cause more than minimal  
15 limitations.” (AR 26.)

16       The Court is not convinced that the ALJ’s reference to “mental impairment” in the  
17 singular must be given the interpretation urged by plaintiff, who contends that the ALJ similarly  
18 erred in failing to consider either her anxiety disorder or ADD at step three of the sequential  
19 evaluation process (AR 26). However, it is not clear from the decision which mental  
20 impairments were considered at step three, as the ALJ references “impairment” in both the  
21 singular and plural form. (AR 26 (“I find that the [plaintiff’s] mental impairment does not meet  
22 any listing in 12.00, *Mental Impairments*[,]”); emphasis added); AR 27 (“Despite her mental

01 impairments, the [plaintiff] retains the mental capacity to understand, remember and repeat  
02 simple tasks[.]”); emphasis added). On remand, the ALJ should also clarify which mental  
03 impairments have been considered as meeting or medically equaling a listed impairment, singly  
04 and in combination, and should conduct a legally sufficient analysis of those impairments  
05 utilizing the four functional “B” criteria. 20 C.F.R. § 416.920a(c).

#### 06 Medical Opinions

07 Plaintiff argues that the ALJ erred in rejecting Dr. Parlatore’s assessment of her mental  
08 limitations. Plaintiff disputes the validity of the ALJ’s conclusion that Dr. Parlataore’s  
09 psychiatric evaluation was not supported by objective evidence, and asserts that Dr. Parlatore’s  
10 handwritten comments contradict the ALJ’s finding that the doctor’s report was in the form of a  
11 “check box” report unaccompanied by reasons for the conclusions. The Commissioner argues  
12 that the ALJ gave specific and legitimate reasons for rejecting Dr. Parlatore’s opinions, citing  
13 Dr. Sandvik’s contrary opinion regarding a volitional aspect to plaintiff’s difficulties with  
14 concentration, and the lack of sufficient explanation by Dr. Parlatore for his opinions.

15 The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
16 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
17 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,  
18 881 F.2d at 751). The ALJ need not accept the opinion of any physician if that opinion is brief,  
19 conclusory, and inadequately supported by clinical findings. *Thomas*, 278 F.3d at 957.  
20 Furthermore, it is reasonable to discount a physician’s prescribed limitations if they are based  
21 on the claimant’s less than credible subjective characterization of her symptoms. *Bray v.*  
22 *Comm’r of SSA*, 554 F.3d 1219, 1228 (9th Cir. 2009).

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02 Discussing Dr. Parlatore's opinions, the ALJ found:

03 I note that Anselm A. Parlatore, M.D. filled out a Written Interrogatory check  
04 form provided by the [plaintiff's] representative circling symptoms addressed in  
05 the "A" criteria and checking boxes indicating marked limitations in the "B"  
06 criteria. I do not find that this opinion is consistent with the record, as detailed  
07 above. Moreover, it is well settled law that check-off reports that do not  
08 contain explanation of the reasons for their conclusions may permissibly be  
09 discounted. There is no accompanying report explaining the circles and check  
boxes Dr. Parlatore submitted and his earlier DSHS check off form does not  
expound such conclusions either. Further, there appears to be no treatment or  
examining notes by Dr. Parlatore from which such draconian limitations could  
be predicated. Therefore, the undersigned finds that Dr. Parlatore's assessment  
of the [plaintiff's] symptoms and functionality expressed in this conclusory  
form shall be given little weight.

10 (AR 27; citations omitted.)

11 The ALJ correctly noted that the written interrogatories signed by Dr. Parlatore on  
12 December 4, 2009 and January 7, 2010 consisted of circles and check boxes unsupported by an  
13 accompanying report. The only handwritten portion of the answers, other than the doctor's  
14 signature, consists of the notation "psychiatric examination of 01/02/07" (AR 690 (referring to  
15 AR 405-10)), which the ALJ likewise did not find to be persuasive support for the conclusions.  
16 While acknowledging plaintiff's report of difficulties with concentration, the ALJ cited the  
17 opinion of Dr. Sandvik that there appeared to be a volitional aspect to her difficulties in this area  
18 as a basis for discounting the limitations assessed by Dr. Parlatore. (AR 27.) The ALJ is  
19 responsible for resolving conflicts in the medical record. *Carmickle v. Comm'r of SSA*, 553  
20 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1020, 1040 (9th Cir.  
21 2003)). The Court does not find error in the ALJ's assessment of Dr. Parlatore's opinions.

22 Plaintiff's Physical Impairments



01       The ALJ found plaintiff's low back pain severe at step two. (AR 22.) At step four,  
02 assessing the degree of plaintiff's physical capacity, the ALJ considered the opinion of  
03 consulting evaluator Dr. Heilbrunn, who conducted an examination of plaintiff in October  
04 2007. (AR 560-564; *see also* AR 323-27.) Plaintiff argues that the ALJ erred in failing to  
05 also consider the presence of degenerative joint disease in plaintiff's neck, hips and hands as  
06 severe impairments adversely affecting her physical abilities. In particular, plaintiff notes Dr.  
07 Heilbrunn's opinion that she was able to "lift, but not carry, as measured in the examination, 10  
08 lbs. with either hand on a frequent basis." (AR 564.) The Commissioner defends the  
09 reasonableness of the ALJ's rejection of this portion of Dr. Heilbrunn's opinion, which  
10 appeared to be based on plaintiff's non-credible self-reports rather than specific physical  
11 testing. Plaintiff disputes the inference that Dr. Heilbrunn's opinion was based solely on her  
12 subjective reports, noting the measurement of her grip strength as 5/5 bilaterally elsewhere in  
13 the report. (AR 563.) The Court, however, agrees with the Commissioner.

14       The ALJ accepted the opinion of Dr. Heilbrunn as to plaintiff's physical capacities, with  
15 the exception of his opinion that she could frequently lift but not carry 10 pounds with either  
16 hand. The ALJ found the other portions of Dr. Heilbrunn's opinion to be consistent with the  
17 record, but found no record of any treatment for wrist or hand complaints since plaintiff applied  
18 for disability. This Court does not find error in the ALJ's observation that the doctor's report  
19 does not specifically refer to testing of the plaintiff's ability to lift or carry. Plaintiff's  
20 argument that the doctor reported the results of her grip strength as 5/5 bilaterally is not  
21 persuasive, as this finding has no apparent relevance as to plaintiff's ability to lift 10 pounds yet  
22 not carry that weight. There is no indication from Dr. Heilbrunn's report that he even

01 considered the grip strength measurement to be deficient or anything other than normal, as the  
02 doctor also commented on the lack of muscle atrophy at this state of the disability evaluation.  
03 (AR 563.)

04 The Court finds that the ALJ reasonably inferred that Dr. Heilbrunn relied on the  
05 plaintiff's subjective opinion in reaching a conclusion about her ability to lift and carry.  
06 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("In reaching his findings, the law  
07 judge is entitled to draw inferences logically flowing from the evidence.") Although the  
08 doctor indicated that the finding was "measured in the examination" (AR 564), that  
09 measurement was likely based on plaintiff's self-report of symptoms, as the evaluation  
10 indicates that plaintiff was instructed to not engage in any physical maneuvers "beyond what  
11 she could tolerate, or which she felt were beyond her limits or could cause physical harm or  
12 injury." (AR 562.) As the ALJ determined that plaintiff's description of her limitations was  
13 not entirely credible, it was reasonable for the ALJ to discount a work limitation based on  
14 plaintiff's subjective characterizations by the doctor. *Bray v. Comm'r of SSA*, 554 F.3d 1219,  
15 1228 (9th Cir. 2009).

#### 16 Credibility

17 Plaintiff's argument that the ALJ erred in assessing her credibility (and, consequently,  
18 the effect of her symptoms on her RFC) is based on her contention that her severe impairments  
19 were not properly assessed at step two. As the Commissioner notes, plaintiff does not  
20 otherwise challenge the ALJ's assessment of her credibility. This Court agrees that the ALJ's  
21 clarification and possible reassessment of her impairments may implicate the ALJ's findings  
22 regarding plaintiff's credibility. Therefore, the ALJ should reassess this finding, if necessary,

01 on remand. Similarly, if the ALJ changes the assessment of the credibility of plaintiff's  
02 symptoms on remand, the RFC assessment may also require reevaluation.

03 Step Five

04 If plaintiff has demonstrated that she has a severe impairment that prevents her from  
05 doing her past relevant work, she has made a prima facie showing of disability. *Tackett v.*  
06 *Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). The burden then shifts to the Commissioner at  
07 step five to demonstrate that, in light of the claimant's RFC, age, education, and work  
08 experience, she can perform other types of work that exist in "significant numbers" in the  
09 national economy. *Id.*; 20 C.F.R. §§ 404.1520(f), 416.920(f). An ALJ can determine this  
10 issue by calling upon a vocational expert (VE) for assistance. *Tackett*, 180 F.3d at 1100. In  
11 such a scenario, the ALJ must provide the VE with an accurate and detailed description of the  
12 claimant's impairments, as reflected by the medical evidence of record. *Id.* at 1101. An ALJ  
13 may, however, exclude restrictions in a hypothetical question that are not supported by  
14 substantial evidence. *Osenbrock v. Apfel*, 240 F.3d 1157, 1164-65 (9th Cir. 2001).

15 In this case, the ALJ found that plaintiff was not able to perform her past relevant work  
16 of cleaner/housekeeper as she performed it at the medium exertional level. However, the ALJ  
17 found that plaintiff was able to perform that work, defined in the Dictionary of Occupational  
18 Titles (DOT) as light unskilled work, as performed in the national economy. *See Johnson v.*  
19 *Shalala*, 60 F.3d 1428, 1434 n.6 (9th Cir. 1995) ("The DOT is 'the Secretary's primary source  
20 of reliable job information'. *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990). One  
21 purpose of the DOT is to classify identified job titles by their exertional and skill  
22 requirements.")

01 Plaintiff argues that the VE testimony was insufficient because the hypothetical failed to  
02 fully and accurately describe her mental and exertional limitations. In that regard, plaintiff  
03 contends that, although the hypothetical assumed the capacity to occasionally lift objects up to  
04 20 pounds and frequently lift objects up to 10 pounds, it failed to specify the amount of weight  
05 plaintiff was capable of carrying. Therefore, plaintiff concludes, the ALJ's RFC finding lacks  
06 the support of substantial evidence. Plaintiff also disputes the ALJ's assumption that plaintiff  
07 can both lift and carry weights up to 20 pounds. As previously discussed, however, the Court  
08 finds no error in the ALJ's rejection of Dr. Heilbrunn's opinion limiting plaintiff to carrying 10  
09 pounds.

10 The Commissioner concedes that the hypothetical posed by the ALJ to the VE did not  
11 specify a carrying ability. (AR 73.) He argues that the transcript of the administrative  
12 hearing nonetheless demonstrates that the VE correctly assumed the hypothetical to encompass  
13 the exertional demands of light work, plus some additional non-exertional restrictions.

14 The Commissioner asserts that the carrying limitations found appropriate by the ALJ  
15 were consistent with the requirements of light work. This is not precisely correct. While the  
16 ALJ found plaintiff capable of lifting and carrying 20 pounds maximum, 10 pounds frequently  
17 (AR 27), the regulations define "light work" as involving "lifting no more than 20 pounds at a  
18 time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. §  
19 416.967(b) (emphasis supplied). Therefore, the ALJ's RFC finding allowed plaintiff to carry  
20 greater weight (20 pounds) than required for light work (10 pounds). The VE testified that  
21 plaintiff's past work as performed in the national economy and as described in the DOT was  
22 light work. (AR 72, 75-76.) It could be said that the ALJ's omission of a carrying limitation

01 in the hypothetical was, at the most, harmless error, as the job identified by the VE was less  
02 rigorous than plaintiff's assessed functional capacity. *See Stout v. Commissioner, Soc. Sec.*  
03 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in  
04 Social Security context where a "mistake was nonprejudicial to the claimant or irrelevant to the  
05 ALJ's ultimate disability conclusion.") On balance, however, because the Court finds it  
06 necessary to remand this case for consideration of other issues, the ALJ should also address the  
07 omission of a carrying limitation in the vocational hypothetical.

08 Plaintiff also challenges the ALJ's failure to include certain mental limitations in the  
09 vocational hypothetical. Specifically, plaintiff argues that a limitation in showing up at a  
10 client's house in a timely manner, a limitation in her ability to concentrate or persist at a task  
11 due to her ADD, and a limitation in performing tasks due to fatigue or crying from her  
12 depression should have been included. However, in light of the substantial evidence  
13 supporting the ALJ's credibility findings, the Court agrees with the Commissioner that the ALJ  
14 did not err in failing to adopt limitations based on that discounted credibility. *See Batson v.*  
15 *Comm'r of the SSA*, 359 F.3d 1190, 1197 (9th Cir. 2004) (ALJ need not include in the RFC  
16 assessment properly discounted opinion evidence or claimant testimony) and *Thomas*, 278 F.3d  
17 at 956 (a hypothetical posed to a VE must include all of the claimant's functional limitations  
18 *supported by the record*) (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)).

#### 19 Remand

20 The decision whether to remand for further proceedings or order an immediate award of  
21 benefits is within the Court's discretion. *See Harmen v. Apfel*, 211 F.3d 1172, 1175-78 (9th  
22 Cir. 2000.) Where no useful purpose would be served by further administrative proceedings,

01 or where the record has been fully developed, it is appropriate to exercise this discretion to  
02 direct an immediate award of benefits. *Id.* at 1179 (noting “that the decision of whether to  
03 remand for further proceedings turns upon the likely utility of such proceedings”). However,  
04 where there are outstanding issues that must be resolved before a determination of disability can  
05 be made, and it is not clear from the record that the ALJ would be required to find the claimant  
06 disabled if all the evidence were properly evaluated, remand is appropriate. *Id.* Here, remand  
07 for further proceedings is appropriate to allow the ALJ to remedy the above mentioned errors.  
08 *Id.* at 1178.

09 **CONCLUSION**

10 For the reasons set forth above, this matter should be remanded for further proceedings.

11 DATED this 29th day of July, 2011.

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14 Mary Alice Theiler  
15 United States Magistrate Judge  
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